(8)

No. 87-1769

In the Supreme Court of the United States

OCTOBER TERM, 1988

GEORGIA ANDREWS, ET AL., PETITIONERS

v.

THE VETERANS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

8 pp.

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1769

GEORGIA ANDREWS, ET AL., PETITIONERS

v.

THE VETERANS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that the court of appeals erred in concluding that gross negligence does not constitute intentional or willful conduct under the Privacy Act of 1974, 5 U.S.C. (& Supp. IV) 552a.

1. Petitioners are registered nurses employed at a Veterans Administration (VA) Medical Center in Cheyenne, Wyoming. In 1984, in response to a written request by the president of the union local that served as the exclusive bargaining representative of nurses at the Medical Center, the VA provided the union with copies of proficiency reports for petitioners and other nurses. The union claimed that the reports were needed "in connection with a grievance the union would possibly file and to facilitate preparation for upcoming labor-management negotiations" (Pet. App. B3-B4). Although the agency attempted to delete all information from the reports that might tend to identify the subjects, petitioners and others claimed that their identities had not been adequately pro-

tected. They brought this action against the VA and the Medical Center alleging that disclosure of their personnel records violated the Privacy Act of 1974 (Privacy Act), 5 U.S.C. (& Supp. IV) 552a. They sought injunctive relief to prevent any future disclosures, damages of $1,000 per nurse to compensate them for mental distress and embarrassment, and attorney's fees (Pet. App. B6).

Pursuant to stipulation, the Medical Center was dismissed as a party, and the case was tried to the district court (Pet. App. B7). After a two-day trial, the district court concluded (*id.* at A7-A8) that the identities of 14 of the nurses could be determined from the contents of the redacted reports and that each had suffered some degree of anguish, embarrassment or other mental trauma from the release of the reports. The district court found (*id.* at A9) that the VA employee at the Medical Center who released the reports on the advice of VA personnel in Washington "acted conscientiously, in good faith, though inadvertently negligently, in releasing the proficiency reports in an inadequately sanitized condition." The court further held (*ibid.*) that VA personnel in Washington were "grossly negligent" in failing to train or guide this employee adequately regarding the release of records subject to the Privacy Act and in directing her that release was required by the Federal Service Labor-Management Relations Act (FSLRA), 5 U.S.C. (& Supp. IV) 7101-7135.

The district court concluded (Pet. App. A9) that gross negligence was sufficient to establish a willful or intentional violation of the Privacy Act, as is required for liability under 5 U.S.C. 522a(g)(1)(D)(4). The district court denied petitioners' request for injunctive relief (Pet. App. A26) but awarded $1,000 to each petitioner who could be identified as the subject of a report (Pet. App. A27). The court also awarded petitioners $5,000 in attorney's fees as prevailing parties (Pet. App. A28).

2. The court of appeals reversed, holding that the district court erred as a matter of law when it equated gross negligence by the VA with the intentional or willful conduct required for damages liability under the Privacy Act. The court of appeals concluded (Pet. App. B22) that "the term 'willful or intentional' clearly requires conduct amounting to more than gross negligence." The court, adopting definitions from a number of other circuits, held (*ibid.* (internal quotation marks and citations omitted)) that under the Privacy Act, intentional or willful conduct must be conduct "so patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful," or "conduct committed without grounds for believing it to be lawful," or "action flagrantly disregarding others' rights under the Act" or conduct that amounts to, "at the very least, reckless behavior."

After reviewing the record, the court of appeals concluded (Pet. App. B22) that "the VA's conduct falls far short of a 'willful or intentional' violation of the Privacy Act." "Indeed," the court stressed (*id.* at B22-B23), "we find that it falls short of even the gross negligence standard applied by the district court to that conduct." The court noted (*id.* at B23) that the VA was required to strike a balance between the union's interest in disclosure, as reflected in the FSLRA, 5 U.S.C. 7114(b)(4)(B), and in the Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552, on the one hand, and the privacy rights of the nurses, on the other. The court stated (Pet. App. B23) that the VA's unsuccessful efforts to sanitize the records "indicate[s] some attempt to reconcile the two competing interests." "We view the inadequacy of those sanitation efforts," the court concluded (*id.* at B24), "as indicative of negligence, at most, on the part of the VA, not the higher level of culpability necessary to establish liability under the Privacy Act."

3. Section 552a(g)(1)(D)(4) provides for damages liability on the part of the United States for a violation of the Privacy Act only if the agency in question "acted in a manner which was intentional or willful." Petitioners do not contend that the VA intentionally violated the Privacy Act. And, in cases dealing with other statutes, this Court has consistently interpreted the term "willful" to require either an intentional violation of a known legal duty or "reckless disregard for the matter of whether * * * conduct was prohibited by the statute." *McLaughlin* v. *Richland Shoe Co.*, No. 86-1520 (May 16, 1988), slip op. 5-6. See also *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125-130 (1985); *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976); *United States* v. *Bishop*, 412 U.S. 346, 360 (1973); *United States* v. *Murdock*, 290 U.S. 389, 394 (1933). It is not parsing too finely to say that "reckless disregard" for whether conduct is prohibited by the statute is a more stringent standard of proof than negligence, however gross. *Bishop*, 412 U.S. at 361.

This reading of the Privacy Act is also borne out by its legislative history. Congress explained the term "intentional or willful" as used in the Privacy Act as follows:

> In a suit for damages, the [compromise] amendment reflects a belief that a finding of willful, arbitrary, or capricious action is too harsh a standard of proof for an individual to exercise the rights granted by this legislation. Thus, the standard for recovery of damages was reduced to "willful or intentional" action by an agency. On a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct, this standard is viewed as only somewhat greater than gross negligence.

Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, reprinted in 120 Cong. Rec.

40406 (1974) (Pet. App. B20). Petitioners (Pet. 9) read this explanation as evidence that Congress equated willful or intentional action with gross negligence. But the plain words that Congress used in explanation of the phrase demonstrate that gross negligence is not the equivalent of intentional and willful conduct under the Privacy Act; rather, the standard is "somewhat greater than gross negligence."

4. Petitioners further contend (Pet. 10-14) that the decision below conflicts with decisions of the Fifth and D.C. Circuits. But although both those courts have suggested in passing that the "intentional or willful" standard resembles gross negligence, neither has expressly held that gross negligence alone satisfies that standard. In *Chapman* v. *National Aeronautics and Space Admin.*, 736 F.2d 238, 243 (5th Cir. 1984) (per curiam), the court suggested that an "unlawful intent" or "ulterior motive" may be necessary to show that an agency violated the statute in an intentional or willful manner. And the D.C. Circuit has held that willful or intentional conduct under the Privacy Act encompasses action that is "so 'patently egregious and unlawful' that anyone undertaking the conduct should have known it 'unlawful,' " *Laningham* v. *United States Navy*, 813 F.2d 1236, 1242 (1987) (citations omitted), or conduct that is committed "without grounds for believing it to be lawful" or action "flagrantly disregarding others' rights under the Act." *Albright* v. *United States*, 732 F.2d 181, 189 (1984).

Far from parting company with these cases, the court below expressly relied upon them (see Pet. App. B21-B22) in formulating the standard it applied in this case. Furthermore, the decision below is also consistent with the holdings of the remaining courts of appeals that have addressed this question. See *Moskiewicz* v. *United States Dep't of Agriculture*, 791 F.2d 561, 564 (7th Cir. 1986);

Wisdom v. *Department of Housing and Urban Development,* 713 F.2d 422, 425 (8th Cir. 1983), cert. denied, 465 U.S. 1021 (1984). In any event, petitioners simply ignore the fact that the court of appeals held (Pet. App. B22-B23) that they were not entitled to prevail even if gross negligence could satisfy the intentional or willful standard. Accordingly, the judgment below would have been the same even if petitioners' standard had been adopted.

The court of appeals properly noted (Pet. App. B23) that the VA attempted to strike a balance between the interest of the union in disclosure and the interest of petitioners in preserving their privacy. Even if the VA struck the wrong balance, and negligently redacted the documents it disclosed, that negligence did not rise to the level of culpability necessary to establish a "willful or intentional" violation of the Privacy Act.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202 037/60563